OCTOBER-IN-REVIEW

International Trade

---

1. WTO Arbitration Authorizes United States to Impose $7.5 Billion in Countermeasures Against Imports of EU Goods

Investor-State Arbitration

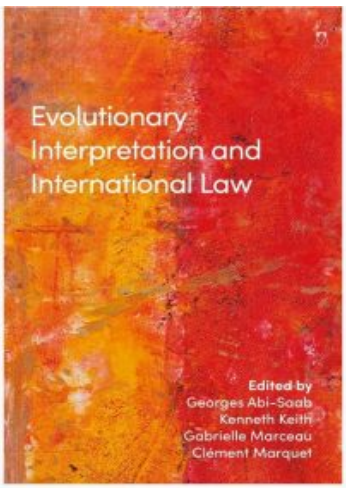
---

2. Third-Party Funding at the Heart of ISDS Reform

New Anti-dumping Investigation

---

3. CBSA Initiates Expiry Review Investigation Concerning Certain Carbon Steel Fasteners from China and Chinese Taipei



Be sure to purchase your copy of,
"Evolutionary Interpretation and International Law"
Edited by Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau & Clement Marquet

With Chapter 25 "*Investment Treaty Signatories' Joint Interpretation and the Case of the NAFTA Free Trade Commission: Evolutionary Interpretation or Modification*" by Tereposky & DeRose LLP's very own Jennifer Radford, Greg Tereposky and Kun Hui

International Trade

1. WTO ARBITRATION AUTHORIZES UNITED STATES TO IMPOSE $7.5 BILLION IN COUNTERMEASURES AGAINST IMPORTS OF EU GOODS

On 2nd October 2019, the decision of a World Trade Organization (**WTO**) Arbitrator was released in the long-running *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* (DS316) dispute. The purpose of the arbitration was to determine the exact amount of the countermeasures that the United States is authorized to take against the European Union, further to the Appellate Body's findings in May 2018 that certain subsidies provided by the European Union and certain EU Member States to the large civil aircraft (**LCA**) manufacturer Airbus have caused serious prejudice to the US industry within the meaning of the *Agreement on Subsidies and Countervailing Duties* (**SCM Agreement**).

The Arbitrator's decision authorizes the United States to take countermeasures against the European Union in the amount of almost US $7.5 billion annually (i.e., US $7,496,623,000). The countermeasures may take the form of (i) the suspension of tariff concessions and related obligations under the *General Agreement on Tariffs and Trade, 1994* (**GATT 1994**), and/or (ii) the suspension of horizontal or sectoral commitments and obligations contained in the United States' schedule to the *General Agreement on Trade in Services* (**GATS**) with regard to all services defined in the Services Sectoral Classification List, except for financial services.

The United States has announced its intention to impose the countermeasures, as authorized, on 18th October (see Office of the United States Trade Representative (USTR), "U.S. Wins $7.5 Billion Award in Airbus Subsidies Case", Press Release (2 October 2019), and *Notice of Determination and Action Pursuant to Section 301: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute*). The countermeasures will take the form of additional duties applied to imports of new EU aircraft (10 percent) and a range of other EU products (25 percent), including certain dairy, fruit, shellfish, processed food, and manufactured goods (see the Final Product List published on the USTR website). The United States intends to apply the "bulk of the tariffs" to goods imported from "France, Germany, Spain, and the United Kingdom" on the basis that these are "the four countries responsible for the illegal subsidies".

The arbitration was conducted under Article 22.6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (**DSU**) (i.e., "if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in [Article 22.3] have not been followed …, the matter shall be referred to arbitration") and Article 7.10 of the SCM Agreement (i.e., "[i]n the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist").

The legal issues in dispute required the Arbitrator to consider (i) the role of Article 7.10 of the SCM Agreement in an arbitration pursuant to Article 22.6 of the DSU, and (ii) whether adverse

effects that are first determined to exist in a compliance report prior to the arbitration can be included in the proposed level of countermeasures.

In this regard, the Arbitrator's reasoning includes the following notable considerations:

- The Arbitrator's mandate is determined under Article 7.10 of the SCM Agreement because this is a special or additional rule and procedure that prevails over Article 22.6 of the DSU.

- In determining whether the proposed countermeasures are commensurate with the degree and nature of the adverse effects determined to exist, the standard in Article 7.10 has three basic elements:

  (a) "countermeasures" (i.e., a temporary suspension of concessions or other obligations), which defines the type of measures that the United States may take;

  (b) "commensurate with" (i.e., a less precise degree of equivalence than exact numerical correspondence, but a relationship of correspondence and proportionality between the other two elements that may be qualitative as well as quantitative), which defines the relationship that must exist between the level of countermeasures and the degree and nature of adverse effects determined to exist; and

  (c) "the degree and nature of the adverse effects determined to exist" (i.e., the adverse effects within the meaning of Articles 5 and 6 of the SCM Agreement, with the term "degree" corresponding to a quantitative element and the term "nature" corresponding to a qualitative element), which is the metric for determining the permissible level of countermeasures.

- Requests pursuant to Article 22.2 of the DSU for authorization to take countermeasures are comparable to requests for the establishment of a panel in the following respects:

  (a) Such requests must comply with the applicable requirements "on their face";

  (b) The text of such requests must be examined "as a whole, and in the light of attendant circumstances"; and

  (c) The analyses of such requests must be made "on the merits of each case".

- Where a request to take countermeasures is made before a compliance proceeding is conducted (i.e., under Article 21.5 of the DSU) in the same dispute, findings of adverse effects in the compliance proceeding can fall within the terms of reference in an arbitration under Article 22.6 of the DSU.

- The maximum level of countermeasures can be determined by reference to a past reference period and may take the form of an annual level of suspension (i.e., of concessions or other obligations under the covered agreements) that might have to be adjusted over time.

- With respect to the timeframe of the reference period, there is no fixed time period that arbitrators are required to use. Rather, the reference period must be representative of the adverse effects determined to exist, taking into account all circumstances. In order to place as accurate a value as possible on the adverse effects, a panel may take into account evidence that was not available during the reference period, provided that this does not alter the adverse effects established in the underlying proceedings or establish any additional adverse effects. In this respect, there is no categorical bar to considering facts that were not placed on the record in the previous proceedings of the dispute.

- In determining the level of countermeasures, it is acceptable to include the value of the components used in the production of the like product at issue (i.e., in this case, Boeing LCA produced in the United States) that were supplied from outside the Member requesting authorization (e.g., inputs secured through international supply chains). To exclude the value of such components from the maximum level of countermeasures would weaken the effectiveness of the WTO dispute settlement mechanism and diminish the compliance-inducement function of authorized countermeasures. The more internationalized the production of an export good is, the more difficult it would be, in practice, for the Member exporting the final good to induce compliance through countermeasures.

- Finally, the value of adverse effects found to exist during the reference period does not have to be adjusted for inflation up until the year in which the countermeasures or suspension could be authorized.

Tereposky & DeRose LLP regularly provides advice and acts as counsel in international trade disputes, including WTO dispute settlement proceedings.

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

Investor-State Arbitration

2. THIRD-PARTY FUNDING AT THE HEART OF ISDS REFORM

The increased reliance on third-party funding ("TPF") in investment treaty arbitration in recent years has led States and arbitral tribunals to examine the phenomenon more closely. Both the United Nations Commission on International Trade Law ("UNCITRAL") Working Group III on investor-state dispute settlement ("ISDS") reform and the International Centre for Settlement of Investment Disputes (the "ICSID") are considering for the first time the inclusion of provisions regulating the use of TPF, addressing concerns such as the lack or apparent lack of independence and impartiality of arbitrators, and the cost of ISDS proceedings and security for costs (see *Security for Costs in Investment Treaty Arbitration: More Certainty Expected under the Proposed ICSID Rules Amendments*).

Proponents of TPF see this as an access to justice tool, allowing otherwise financially constrained investors to bring claims against States. Opponents on the other hand see TPF as enabling investors to exploit the ISDS systems at the expense of developing countries and their taxpayers, incentivizing unmeritorious claims and raising additional conflict of interest issues for arbitrators. The reforms proposed by both the UNCITRAL and the ICSID seek to address these concerns.

A. UNCITRAL's Working Group III on Investor-State Dispute Settlement Reform

On 14-18 October 2019, the UNCITRAL Working Group III on ISDS reform will hold its thirty-eight session in Vienna, Austria.

As part of its agenda, the Working Group is expected to continue its consideration of third-party funding in ISDS, based notably on document A/CN.9/WG.III/WP.172 on third-party funding. The document provides an overview of possible reform options in light of the suggestions made during the deliberations of the Working Group at its thirty-seventh session, including (1) prohibiting third-party funding entirely in ISDS; and (2) regulating third-party funding by introducing mechanisms to ensure a level of transparency including through disclosures (which could also assist in ensuring the impartiality of the arbitrators), by imposing sanctions for failure to disclose, and by providing rules on third-party funders and on when they could provide funding.

The Working Group will also consider the various means of implementation of a third-party funding reform in ISDS, such as a prohibition or regulation developed so as to be included in arbitration rules, as model clauses with variants for investment treaties, or through an opt-in convention that could be modelled after the *Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration* and the *OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*.

We are following these developments closely. Please subscribe to our newsletter to receive regular updates on this issue.

B. The Proposed Amendments to the ICSID Rules

On 11-15 November 2019, the ICSID will hold its next in-person consultation with Member States regarding its third Working Paper ("Working Paper #3") on the proposed amendments to the ICSID Rules.

Among the proposed changes is the inclusion of a provision regulating the use of third-party funding. Under proposed Rule 14, a party must file with the Secretary-General "a written notice disclosing the name of any non-party from which the party, its affiliate or its representative has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the dispute". The notice must be filed "upon registration of the Request for arbitration, or immediately upon concluding a third-party funding arrangement after registration".

In Working Paper #3, the ICSID maintains its position regarding the extent of initial disclosure, imposing a positive duty on parties to disclose funding. However, it does not create a general duty to disclose the funding agreement or the terms of the funding. To prevent conflict of interest, parties are only required to disclose the existence of funding and the identity of the funder throughout the proceedings. The identity of the funder is disclosed to the arbitrators prior to appointment to avoid inadvertent conflicts of interest. Additionally, arbitrators are required to confirm that there is no conflict with the named funder through the Arbitrator Declaration.

After the in-person consultation with Member States, the amended rules will be placed before the ICSID's Administrative Council for a vote.

3. Third-party Funding in Investment Treaties

While arbitral tribunals are considering regulating the use of third-party funding in investment treaty arbitration, States should consider incorporating provisions on third-party funding into their investment treaties which would reflect their policy objectives.

For instance, the *European Union-Viet Nam Investment Protection Agreement* and the Canada-European Union *Comprehensive Economic and Trade Agreement* both regulate the use of third-party funding, using similar language as ICSID's proposed Rule 14.

However, other treaties such as the *Argentina-United Arab Emirates Bilateral Investment Treaty* have gone one step further by including a prohibition on the use of third-party funding in ISDS. Similarly, the United States restricts TPF of domestic claims against the federal government.

Addressing third-party funding in investment treaties therefore allows States to prohibit or regulate its use in ISDS by, for example, including mechanisms that place the burden on the claimant to demonstrate that it meets certain criteria such as impecuniosity, exhaustion or local remedies, and clean hands, among other.

Tereposky & DeRose LLP regularly provides advice and counsel on investment arbitration disputes and treaty negotiation. Should you have any questions regarding investor-state dispute settlement, we are at your disposal.

Jennifer Radford
613.237.9777
jradford@tradeisds.com

Stephanie Desjardins
613.237.8680
sdesjardins@tradeisds.com

Graciela Jasa
613.237.4742
gjasa@tradeisds.com

New Anti-Dumping Investigation

3. CBSA INITIATES EXPIRY REVIEW INVESTIGATION CONCERNING CERTAIN CARBON STEEL FASTENERS FROM CHINA AND CHINESE TAIPEI

On 29 October 2019, the Canada Border Services Agency (**CBSA**) published a Notice of Initiation of Expiry Review Investigation (FAS-2019-ER) concerning the dumping and subsidizing of certain carbon steel fasteners (including different types of screws that are usually classified under tariff subheadings 7318.11, 7318.12, 7318.14, and 7318.15) imported into Canada from the People's Republic of China (China) and the dumping of such goods from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei).

The initiation of the CBSA's investigation follows one day after the Canadian International Trade Tribunal initiated its expiry review of the anti-dumping and countervailing measures that are currently in force with respect to the subject goods. These measures have been in place since January 2005 (see NQ-2004-005 and NQ-2004-005R) and have been extended in two previous expiry review proceedings (see RR-2009-001 and RR-2014-001).

The schedule of the CBSA's investigation and the listing of exhibits have been posted online. Questionnaire responses must be filed by 5th December, and the record will close on 18th December. Interested parties may filed case briefs by 12 noon on 7th January 2020.

Tereposky & DeRose regularly provides advice on Canadian anti-dumping and countervailing duty matters. Should you have any questions regarding this matter or anti-dumping and countervailing duty issues more generally, we are at your disposal.

Greg Tereposky
613.237.1210
gtereposky@tradeisds.com

Daniel Hohnstein
613.237.9005
dhohnstein@tradeisds.com

Vincent DeRose
613.237.8862
vderose@tradeisds.com